Supreme Court, U.S.
FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-575

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN J. HARTER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to the Foreign Service Act of 1980 and its implementing regulations, an agency may use – and the Foreign Service Grievance Board may credit – the results of a Reconstituted Selection Board's deliberations in grievance proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	6
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	5
Reiner v. *United States*, 686 F.2d 1017 (D.C. Cir. 1982)	2

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706	2
Foreign Service Act of 1980, 22 U.S.C. 3901 *et seq.*:	
22 U.S.C. 3901	2
22 U.S.C. 4002	2, 3
22 U.S.C. 4002(a)	2
22 U.S.C. 4002(b)	4
22 U.S.C. 4003	2, 3
22 U.S.C. 4007	2
22 U.S.C. 4131(a)(1)(A)	2
22 U.S.C. 4134	2
22 U.S.C. 4135	2
22 U.S.C. 4136	2
22 U.S.C. 4136(4)	5, 6
22 U.S.C. 4140	2
22 C.F.R.:	
Section 905.1(b)	2
Section 906.7(b)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 871 F.2d 1140. The opinion of the district court (Pet. App. 66-67) and the decision of the Foreign Service Grievance Board (Pet. App. 135-174) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1989. A petition for rehearing was denied on July 12, 1989 (Pet. App. 207-208). The petition for a writ of certiorari was filed on October 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Service consists of federal employees, primarily in the Department of State, who assist the Presi-

dent and the Secretary of State in conducting the foreign affairs of the United States. 22 U.S.C. 3901. Promotions in the Foreign Service are based upon recommendations and rankings of competing Foreign Service Officers by selection boards established pursuant to the Foreign Service Act of 1980 (Act). 22 U.S.C. 4002, 4003. The Act requires the selection boards to rank officers according to "precepts established by the Secretary [of State]" based on "relative performance." 22 U.S.C. 4002(a). The Secretary is required to promulgate regulations prescribing a time-frame within which officers must be promoted, if eligible; those officers who fail to be promoted within the prescribed time period face mandatory retirement from the Service. 22 U.S.C. 4007.

An officer who believes that his failure to be promoted was the result of "inaccuracy, omission, error, or falsely prejudicial character of information" (22 U.S.C. 4131(a)(1)(A)) in his personnel record may challenge the alleged error by filing a grievance with the Foreign Service Grievance Board (Board). 22 U.S.C. 4134, 4135, 4136. If dissatisfied with the Board's decision, the grievant may then seek judicial review in a federal district court, in accordance with the Administrative Procedure Act, 5 U.S.C. 706. 22 U.S.C. 4140. The grievant has the initial burden to show that the alleged error was a "substantial factor" in the selection board's decision not to recommend promotion. 22 C.F.R. 905.1(b); *Reiner* v. *United States*, 686 F.2d 1017, 1021 (D.C. Cir. 1982). If the grievant makes that initial showing, the burden then shifts to the State Department to show by a preponderance of the evidence that, even in the absence of the Department's administrative error, the officer would not have been promoted. 22 C.F.R. 905.1(b); *Reiner*, 686 F.2d at 1021.

2. a. Petitioner was involuntarily retired from the Foreign Service in 1983 after he failed to attain promotion

to the Senior Foreign Service at the expiration of his time in class.[1] He filed a grievance with the Board, alleging that certain unfavorable remarks in his Employee Evaluation Report (EER) may have contributed to his being passed over. The Board initially denied relief, but the district court remanded the grievance to the Board, ordering the State Department to establish, if it could, that petitioner would not have been promoted even absent the unfavorable remarks. Pet. App. 3-4, 68.

b. On remand to the Board, the State Department sought to discharge its burden. Toward that end, it convened a Reconstituted Selection Board (RSB), a panel that attempts to replicate as closely as possible the circumstances and procedures of the original selection board.[2] After the allegedly prejudicial remarks had been redacted from petitioner's file, the RSB compared that file to those of the lowest qualified candidates who had been promoted in the 1983 class. Notwithstanding the deletions, the RSB ultimately ranked petitioner below all of the other officers whose files were before it. The Department submitted those results to the Board as part of its case on remand. Pet. App. 7

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[1] At the time of his separation, petitioner's classification was FSO-1. Pet. App. 31.

[2] The RSB members are selected in accordance with the same guidelines, and operate in accordance with the same rules, as do regular selection board members. See 22 U.S.C. 4002, 4003. There are, however, some differences in the process by which recommendations and rankings are made. Whereas the original selection board first determines which officers will or will not be recommended for promotion consideration, and then ranks in order of merit those whom it has recommended for consideration, the RSB simply compares the grievant's file to the files of those officers who were at the bottom of the original selection board's rank order list, just above the promotion line. The RSB, which is not told which file is the grievant's, deems a grievant promoted if he ranks higher than anyone promoted by the original selection board. See Pet. App. 157-159.

The Board credited the RSB results and held that the agency had met its burden of proof. In so doing, the Board rejected petitioner's objections to the Department's use of an RSB. The Board approved the use of reconstituted boards "as a means for agencies to obtain evidence to be weighed along with other evidence in their effort to meet the burden of proof." Pet. App. 150. While noting that the RSB procedure is "imperfect," the Board explained that it is "a much fairer way to determine promotability than is a decision by management alone." *Ibid.* In particular, the Board noted, reconstituted boards are structured "in accordance with the rules for regular boards," in that they include members of the public, women and minorities, and officers of the appropriate grade and specialty. See 22 U.S.C. 4002(b); Pet. App. 151. Moreover, the Board observed, RSB members are sworn and instructed to follow the precepts that governed selection boards in the year in question. Pet. App. 151.

c. Petitioner again appealed to the district court, which affirmed the Board's denial of relief. Pet. App. 66. The district court explained that the Department was entitled to rely on the conclusions of an RSB in carrying its burden of proof, and that it was appropriate for the Board to consider the RSB results in reaching its decision. Pet. App. 70. The court held that the administrative record on remand "amply supports the conclusion that it is unlikely that [petitioner] would have been promoted had the deletions been made at the time of the challenged selection." Pet. App. 61.

d. The court of appeals affirmed. Pet. App. 1-17. The court first rejected the contention that the Foreign Service Act of 1980 precludes the Department's use of—and the Board's reliance upon—the results of RSB deliberations. The court explained that the Foreign Service Act explicitly sanctions the use of "any oral or documentary evidence" in grievance proceedings, subject only to a requirement that

the Board exclude "irrelevant, immaterial, or unduly repetitious evidence." 22 U.S.C. 4136(4). Pet. App. 9. Particularly in light of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court continued, petitioner failed to establish that the Board had unreasonably applied its broad procedural authority, or that it had erred in accepting the RSB's evidence. Pet. App. 9-10. Moreover, the court noted, "[i]n endorsing the use of an RSB" in this case, "the Board reasonably opted to rely on 'a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act.' " Pet. App. 11. The court accordingly concluded that "[i]t was plainly within the Board's discretion to fashion the grievance-resolution process after the statutory promotion procedure." Pet. App. 14. Finally, the court rejected petitioner's claim that the RSB had not reviewed a sufficient number of files in this case, noting that this contention "goes only to the weight, and not to the 'admissibility' of the resulting evidence." Pet. App. 16.

ARGUMENT

The decision of the court of appeals is correct, and, as petitioner acknowledges (Pet. 3), it does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

Petitioner does not dispute the court of appeals' holding that the RSB mechanism resembles as closely as possible the selection boards that are mandated by the Foreign Service Act of 1980. Indeed, petitioner acknowledges that a reconstituted board is "composed of members of similar composition as selection boards" (Pet. 7). He contends, however, that there is no explicit statutory or regulatory authority for the RSB procedure. But as the court of appeals recognized (Pet. App. 9), the Foreign Service Act of

1980 expressly authorizes the Department to submit, and the Board to receive, "any oral or documentary evidence"—subject only to the restriction that such evidence not be "irrelevant, immaterial, or unduly repetitious" (22 U.S.C. 4136(4)). Pursuant to that broad mandate, the Board plainly has discretion to accept the determinations of an RSB.

Petitioner asserts (Pet. 8), however, that the Board erred in relying upon the RSB's finding because it constituted hearsay evidence. That contention is meritless. Nothing in the Foreign Service Act of 1980 prevents the Board from considering hearsay evidence (see 22 U.S.C. 4136(4)), and the Grievance Board regulations expressly state that the Board "shall not be limited by the legal rules of evidence" (22 C.F.R. 906.7(b)).[3]

[3] *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), on which petitioner relies (Pet. 9), has nothing to do with the issue in this case. In *Accardi*, the Court held that petitioner was entitled to prove his allegation that the Board of Immigration Appeals had failed to exercise its discretion because its decision was dictated by the Attorney General. There is no suggestion in this case that the denial of promotion was dictated by a superior government official, or that the appropriate decisionmakers were unable to exercise their statutory authority.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1989

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—262 203/00639